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ORIGINAL SCIENTIFIC PAPER

# ENTITIES OF LOCAL SELF-GOVERNMENT AS POSSIBLE HOLDERS OF HUMAN RIGHTS

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***Abstract:*** *In this article, the author, using the scientific method of comparison and analysis, presents the case law regarding position of municipalities and other self-governing local communities as entities of public law as potential human rights holders. These self-governing local communities generally share the principled position of entities of public law, to which the legal order recognizes (merely) the status of the addressee of human rights, not the holder. From the constitutional case law of some European countries (Germany, Liechtenstein, Switzerland), especially Slovenia, and the United States of America, as a representative of the Anglo-Saxon legal system, it follows that local communities are recognized as holders of human rights either by enforcing the so-called procedural human rights (as this does not require a link with exercising dignity of an individual) and property rights or the right to filing the so-called municipal constitutional complaints when it comes to enforcing protection of local self-government against unconstitutional interference with the constitutional right to local self-government. The author believes that the development of titularity of municipalities in relation to human rights, i.e. municipalities as holders of human rights, is often subject to legal policy.*

***Key words:*** *local self-government, municipalities, human rights, a holder of human rights, entities of public law*

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## 1. INTRODUCTION

Municipalities and other self-governing local communities are territorial entities – legally, entities of public law, through which self-government of people is exercised within a certain (local) area, i.e. exercising certain subjects, generally community members to whom it may concern.[2]

The topic of this paper, the question whether municipalities and other self-governing local communities can be holders (titulars) of human rights and to what extent, generally shares the faith of a wider range of topics concerning legal entities in general, and especially legal entities which are holders of public authorizations as possible holders of human rights.[3]

Although in original constitutional texts an individual (individuum) as a natural person is determined as a fundamental holder of human rights, entities of private law are now generally granted undisputable human rights in constitutional case law, »if their nature allows them to be applied to legal entities as well«.[4]

The position of entities of public law (municipalities and other self-governing local communities), which mainly act as holders of a certain public (though local) power, is in principle different, which is why municipalities i.e. other self-governing local communities as such are more of a recepient (addressee) than a holder (titular) of human rights.[5]

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2 See Janez Šmidovnik, *Lokalna samouprava* (Cankarjeva založba, Ljubljana: 1995), 28.

3 Different authors use different attributes as conclusive criteria when dividing legal entities into public and private, a memorandum of association being the most common, i.e. the law or other authoritative acts for the legal entities of public law. Other possible criteria are:
authorization of public law, public financing, supervision of the Court of Auditors, mandatory membership etc. According to the criterion of a Memorandum of Association, a legal entity of public law is the entity founded by an Act of public law (a law or an appropriate regulation, e.g. of the local community), while all other entities are legal entities of private law. See Vida Mayr, *Spregled pravne osebnosti* (Založba Uradni list, Ljubljana: 2008), 33.

4 General issues see Mirjam Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten* (Duncker&Humblot, Berlin: 2017).

5 According to the practice of the European Court of Human Rights in Strasbourg, the position of addressees of human rights prevents municipalities i.e. other self-governing local communities to claim protection from the Constitutional Court, but it does not prevent them from claiming i.e. exercising their rights at regular Courts. The question whether territiorial entities of (regional, local, municipal) self-government can be qualified as »victims« within the meaning of the European Convention on Human Rights and whether, with respect to the above stated, they have the right to file a claim/complaint according to the European Convention on human rights with the purpose of protecting the rights stated by the Convention, has been dealt with in the standing case law of the European Court of Human Rights. A principled standpoint of the European Court of Human Rights was established in the case of e.g. *Ayuntamiento de Mula against Spain* (no. 55346/00, 2001), stating that entities and bodies of territorial self-government have no right to file a claim since, disregarding the level of their autonomy, they participate in exercising public administration. See paragraph 2.2. of the Decision of the Constitutional Court of Croatia no. U-III-462/2010 of 10 September, 2013.

The question is whether entities of public law (municipalities as well) can be titulars of human rights.[6] Namely, the question is whether the teleology of human rights allows their protection to be extended to entities of public law in a wider sense [7] i.e. to other holders of state or local government and whether the state, municipalities and self-governing local communities (as legal entities) are, in essence, tributaries, i.e. addressees of human rights – namely, those who are obliged to respect human rights i.e. to preserve them, instead of being (simultaneously) their holders[8] (titulars or beneficiaries).[9] This fundamental starting point denotes that the purpose of human rights is to protect an individual from the state (as rights of a negative status, as a defensive right), instead of protecting the state as such.

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6 See: Herbert Bethge, *Die Grundrechtsberechtigung juristischer Personen nach Art. 19 Abs. 3 Grundgesetz*, Passau, 1985; Karl August Bettermann, *„Juristische Personen des öffentlichen Rechts als Grundrechtsträger"*, in: *Neue Juristische Wochenschrift* (1969), 1321; Norbert Zimmermann, *Der grundrechtliche Schutzanspruch juristischer Personen des öffentlichen Rechts*, München, 1993; Philipp Lindermuth, *Der Grundrechtsschutz des Staates und seiner Einrichtungen*, in: Arno Kahl/ Nicolas Raschauer/ Stefan Storr (ed.), *Grundsatzfragen der europäischen Grundrechtscharta*, Verlag Österreich, 2013; Wiltraut Rupp v. Brünneck, *Zur Grundrechtsfähigkeit juristischer Personen*, in: Horst Ehmke/ Carlo Schmidt/ Hans Scharoun (ed.): Festschrift für Adolf Arndt zum 65. Geburtstag, Frankfurt am Main, Europäische Verlagsanstalt, 1969, 349; Heinrich Scholler/ Siegfried Broß, „Grundrechtsschutz für juristische Personen des öffentlichen Rechts", in: *Die öffentliche Verwaltung*, (1978), 238; Otto Seidel, *Grundrechtsschutz juristischer Personen des öffentlichen Rechts in der Rechtsprechung des Bundesverfassungsgerichts*, in: Walther Fürst/ Roman Herzog/ Dieter C. Umbach (ed.), *Festschrift für Wolfgang Zeidler, Band 2,* Berlin, New York, Gruyter (1987), 1459; Werner Siepermann, „Die öffentliche Hand als Grundrechtsträger*"*, in: *Die öffentliche Verwaltung*, (1975), 263; Siegfried Broß, „Zur Grundrechtsfähigkeit juristischer Personen des öffentlichen Rechts*"*, in: *Verwaltungsarchiv* (1986), 65; Luisa Crones, *Grundrechtlicher Schutz von juristischen Personen im europäischen Gemeinschaftsrecht*, 2002; Horst Dreier, *Art. 19 III.*, in: Horst Dreier (ed.), *Grundgesetz Kommentar Band I*, 2013; Horst Dreier, *Zur Grundrechtssubjektivität juristischer Personen des öffentlichen Rechts*, in: Norbert Achtenberg (ed.), Festschrift für Scupin, *Öffentliches Recht und Politik*, (1973), 81; Walter Frenz, „Die Grundrechtsberechtigung juristischer Personen des öffentlichen Rechts bei grundrechtssichernder Tätigkeit*"*, in: *Verwaltungsarchiv* (1994), 22; Ludwig Fröhler, *Der Grundrechtsschutz der interessenvertretender Körperschaften des öffentlichen Rechts*, in: Schäffer/ Köringhofer (ed.), *Im Dienst an Staat und Recht*, Internationale Festschrift Erwin Melchiar zum 70. Geburtstag, 1989, 9; Ernst-Werner Fuß, *„Grundrechtsgeltung für Hoheitsträger"* in: *Deutsches Verwaltungsblatt* (1958), 739; Josef Isensee, *Anwendung der Grundrechte auf juristische Personen*, in: Josef Isensee/ Paul Kirchof (ed.), *Handbuch des Staatsrechts des Bundesrepublik Deutschland*, 2011, 911; Klaus Kröger, „Juristische Personen des öffentlichen Rechs als Grundrechtsträger*"*, in: *Juristische Schulung* (1981), 26; Enrique Sánchez Falcón, „La distincion entre personas juridicas de derecho publico y personas juridicas de derecho privado (Verdades y confusiones de una problemática)", pp: *Revista de derecho público*, n. 15 (1983), 78–86; Gregor Heißl, *„Grundrechtsträgerschaft juristischer Personen, Systematik in der österreichischen Rechtsordnung"*, in: *Zeitschrift für öffentliches Recht*, n. 2 (2016), 215–239.

7 Some use the concept of »state actors« or »entities of public law«, as well as »legal entities, closely related to the state« – German, *juristische Personen mit besonderer Nähe zum Staat*.

8 This is a so-called argument of confusion (German, *Konfusionsargument*).

9 See W. Höfling: *Träger der Grundrechte*, in: Andreas Kley/ Klaus A. Vallender (ed.), *Grundrechtspraxis in Lichtenstein* (Verlag der Liechtensteinischen Akademischen Gesellschaft, Schaan: 2012), 75.

In older Swiss legal theory, e.g. the issue of entities of public law as holders of human rights used to be treated, in the first place, in relation to the freedom of trade and commerce. However, titularity of these entities was more than once rejected, as cited by *Burckhard*: »Freedom of trade and commerce does not concern the relation of public law corporations with the state or even the activity of the state itself. If municipalities practise a trade, they practise it in compliance with the public law; it is the municipal legislation which allows it; it can forbid it as well; there is no space for exercising individual rights of trade freedom. It would be very short-sighted of a legislator to provide trade freedom to public law corporations as entities of private law.“[10] In reference to legal equality, he continues as follows: »Constitutional rights have not been provided to entities of public law that are integral part of the state, but exclusively to entities of private law in their relation against the state; i.e. against the state itself as well as against its subdivisions. The constitution wanted to ensure the freedom of an individual against the authority of the state, and not to achieve proper allocation of the authority of the state among various parts of a state as an organism. Only the autonomy of municipalities, which has been speciffically secured by cantonal constitutions, has a different meaning.«[11]

Nowadays, the constitutional case law has extended the otherwise limited extent of titularity of human rights to municipalities as well, partly due to the importance of achieving the purpose of a local self-government, the issue we want to warn about, as set out below (by comparison of the case law of Germany, Liechtenstein, Switzerland, the United States of America and Slovenia). Exercising judicial and constitutional protection of local communities, is also about accomplishment of principles stipulated by the Article 11 of the European document on local self-government of October 15, 1985. The Article 11 determines: »Local authorities are entitled to judicial protection, in order to ensure an unobstructed execution of their authorizations and respect for

10 „*Die Handels- und Gewerbefreiheit berührt auch nicht die Beziehungen der öff.-r. Korporationen zum Staat oder gar die Tätigkeit des Staates selbst. Wenn die Gemeinden ein Gewerbe betreiben, so tun sie es kraft kant. Öff. Rechts; die Gemeindegesetzgebung ist es, die es ihnen gestattet; sie kann es ihnen verbieten; für die Geltendmachung des Individualrechts der Gewerbefreiheit bleibt … kein Raum. Es müsste auch ein kurzsichtiger Gesetzgeber sein, der die Gewerbefreiheit öff.-r. Korporationen wie Privatpersonen gewährleistete*.“ Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 139.

11 „*Die verfassungsmässigen Rechte sind den Personen des öffentlichen Rechts, die ein Bestandteil des Staates sind, auch gar nicht gewärleistet, sondern nur dem Privaten gegenüber dem Staat; gegenüber dem Staat selbst wie gegenüber seinen Unterabteilungen. Die Freiheit des Privaten gegenüber der Staatgewalt wollte die Verfassung schützen, nicht die richtige Verteilung der Staatsgewalt unter die verschiedenen Teile des staatlichen Organismus. Nur die in kant. Verfassungen besonders gewährleistete Autonomie der Gemeinden hat jenen anderen Zweck.“* Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 139.

principles of the local self-government as stated by the Constitution and national legislation«.

## 2. ENTITIES OF PUBLIC LAW AS HOLDERS OF HUMAN RIGHTS – GENERAL

A fundamental differentiation between legal entities of private law and public law corporations pervades the system of principles on which human rights have been founded for the entire Germany. The fundamental starting point can be perceived from the main decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of May 2, 1967. (no. BVerfGE 21, 362): »The concept of »the essence of human rights« (German, »*Wesen der Grundrechte«*) has been indicating from the very beginning a fundamental differentiation between the two types of legal entities. The value system of human rights emanates from dignity and freedom of an individual as a natural person. Human rights should, accordingly, in the first place, protect the free sphere of an individual from the interference of public administration and thus preserve the presumptions for free active participation and formation of an individual in the community. This is why this concept justifies inclusion of legal entities into the domain of protection of human rights only when their foundation and operation is an expression of free formation of natural persons, especially when piercing the corporate veil (German, *Durchgriff*), i.e. treating a corporation as its shareholders, standing behind the legal entity, is meaningful or necessary. Generally, there are some dilemmas wheteher to extend titularity to human rights to legal entities performing public tasks. Since human rights refer to the relation of an individual to public authorities, it is inconsistent for a state to be a bearer, holder or beneficiar (beneficiary) of human rights; a state cannot be the addressee and beneficiary of human rights at the same time. We can imagine interference and transgression of authorization made by a holder of public authorization with the function and possession of another holder of public authorizations, but in that case, it is (only) a competence dispute in the wider sense of that word (and not a violation of human rights)«.[12]

After a thorough review of the constitutional judicature development, e.g. the Constitutional Court of Liechtenstein, we can recognize a comparative basic concept, which highlights that the primary function of human rights is »to defend rights against the state« (German, *Schutzrechte gegen den Staat*).[13] In this regard,

12 See the decision of the Federal Constitutional Court of Germany (Bundesverfassungsgericht), no. BVerfGE 21, 362.
13 See Decision no. StGH 2000/10 of December 5, 2000, 15.

legal entities of public law are »*only rarely legitimized to file a constitutional complaint to the Constitutional Court on account of a violation of the rights guaranteed by the Constitution«*.[14]

Case law of the Constitutional Court of Germany and the dominant constitutional theory responds to the above mentioned questions in the sense of »rule-exception« concept. The fundamentals of the concept of human rights is »*to protect free spheres of an individual as a natural person from the interference of the state authorities«*[15], which is leading to the fundamental standpoint that legal entities of public law are not capable of being holders of human rights. Despite this, some exceptions are possible and they need to be specifically founded. Germany, for instance, recognizes the exception related to titularity of legal entities of public law as holders of human rights in case of public universities, public radio-television and church (it is a so called triad of exceptions – German, »*Ausnahmetrias«*).[16]

In Switzerland, for instance, we can find a basically similar model based on the rule and exception system; here also the starting standpoint is that a constitutional complaint is a »legal remedy for protection of constitutional rights from interference of the state authority. Generally, these rights are granted to *entities of private law, but not to the (state) community as a holder of the sovereign power.*"[17] This fundamental standpoint applies to the federal state, cantons and municipalities, and to all holders of power, derived from that community.[18] Judicature acknowledges some exceptions in favour of certain

14 See Decision no. StGH 2000/12 of December 5, 2000, 18. See also: Ignacio Torres Muro, „Entes públicos y derechos fundamentales*"*, in: *Foro, Nueva época*, *vol. 17, n. 2* (2014), 347–368; José Manuel Díaz Lema, „Tienen derechos fundamentales las personas jurídico-públicas*?"*, in: *Revista de Administración*, *n. 120* (1989), 102; Lorenzo Martín-Retortillo Baquer, „Organismos autónomos y derechos fundamentales*"*, in: *La Europa de los derechos humanos*, Madrid, Centro de Estudios Políticos y Constitucionales, 1989, 224; Antonio Gisbert Gisbert, „La acción popular y las personas jurídicas públicas", in: *Revista Jurídica de la Communidad Valenciana*, *n. 22* (2007), 100; Francisco Velasco Caballero, *Administraciones públicas y derecho a la tutela judicial efectiva*, Barcelona: Bosch, 2003; Maria Teresa Caballeira Rivera, „Gozan de derechos fundamentales las Administraciones Públicas", in: *Revista de Administracion Pública*, *n. 158* (2002), 233; Juan Manuel Alegre Ávila, „A vueltas con los derechos fundamentales de los poderes públicos", in: *Revista Vasca de Administración Pública, n. 61* (2001), 319; Francisco de Borja López-Jurado, „La doctrina del Tribunal Constitucional Federal alemán sobre los derechos fundamentales de las personas jurídico públicas: su influencia sobre nuestra jurisprudencia constitucional", in: *Revista de Administración Pública, n. 125* (1991), 557; Pablo Ruiz-Jarabo, „Los derechos fundamentales de los poderes públicos: de la legitimación en el proceso a la limitación del poder*"*, in: *Revista Jurídica de la Universidad Autónoma de Madrid*, *n. 9* (2003), 144–163.

15 See Decision no. StGH 2000/12 of December 5, 2000, 18.

16 See W. Höfling, *Träger der Grundrechte*, in: Kley, Vallender (ed.), *Grundrechtspraxis in Lichtenstein,* 76.

17 See Decision no. BGE 125 I 173 E. 1.

18 See Decision no. BGE 121 I 218, 219.

holders of autonomy (e.g. municipalities). The case law of e.g. the Constitutional Court of Lichtenstein is based on a similar judicature.[19]

## 3. COMPARATIVE VIEW ON CASE LAW IN RELATION TO MUNICIPALITIES AND OTHER SELF-GOVERNING LOCAL COMMUNITIES AS HOLDERS OF HUMAN RIGHTS

### 3.1 Germany

According to the case law of the Federal Constitutional Court of Germany, municipalities cannot claim their human rights.[20] As in case of other public law institutions, this is implied, in the first place, when they perform public tasks.[21] The fact that municipalities are subject to measures of communal supervision cannot lead to the conclusion that they can (simultaneously) be holders of human rights. In this respect, the Federal Constitutional Court of Germany has stated most accurately that there is a relationship of hierarchy, providing guidelines, instructions and dependance between different holders of public authority, where (otherwise) overstepping jurisdiction of one holder of authority and interference with another's domain might occur. Still, this is in essence (merely) all about defining competences within a state, and not about the usage of human rights (by one state authority in comparison to another).[22]

The Federal Constitutional Court of Germany rejects the possibility of municipalities claiming human rights even in cases when they are not conducting tasks delegated by the authorities.[23] For instance, a court in a municipality which stated that it had not been adversely affected while conducting public tasks, also rejected the possibility of claiming the right to property from Article 14 of *Grundgesetz*. The Decision of the Court was based on the arguments stating that municipalities by the mere fact that they are not conducting tasks delegated

19 Case no. StGH 2000/10, decision of 5. 12. 2000, 19.

20 Self-government of a community (German, *das kommunale Selbstverwaltungsrecht*) pursuant to para. 2 Art. 28 Grundgesetz (GG) is not a human right. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 104.

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22 See BVerfG-K, in: Landes- und Kommunalverwaltung: 2007, 510. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 104.

23 See Baldegger *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 104 warns about a special case in Bavaria where the case law of the Bavarian Constitutional Court allows municipalities (German, *Gemeinden*) and counties (German, *Landkreise*), when performing non-public authorizations, to claim their right to property according to Article 103 of the Bavarian Constitution.

by the authorities, do not have grounds for claiming adverse effects in the same way as individuals and thus are not in the position typical for the cases of human rights violation (German, »*grundrechtstypische Grundrechtslage«*).[24] The Constitutional Court emphasized that economic activities of municipalities and other public law corporations are connected with the public purpose/goal and that, in the end, they have to be conducted within the delegated competences.[25]

In reference to the right to property claimed by the municipality, the Decision of the Court was based on the arguments stating that »in hands of a municipality … property does not serve the function, because of which it was secured by a human right, of being the basis for a private initiative of the owner and to serve private interests in compliance with the personal responsibility; the right to property (Article 14 of *Grundgesetz*) as a constitutional right does not protect private property (German, *Privateigentum*), but the property of a private entrepreneur (German,«*das Eigentum Privater«*).«[26] Municipalities are not entitled to the general freedom of acting (German, »*allgemeine Handlungsfreiheit«*) stipulated by paragraph 1 of Article 2 of *Grundgesetz* (pursuant to which everyone has »the right to form their personality freely, if by this neither the rights of others nor constitutional legal order or moral laws are violated«).[27]

Municipalities and other self-governing local communities as legal entities of public law are entitled to being holders of human rights, the so-called procedural human rights.[28] The Federal Constitutional Court of Germany decided that human rights stipulated by paragraph 1, Article 101 and paragraph 1, Article 103 GG – the right to a lawful judge, the right to a statement/interrogation – belong to all procedural parties, i.e. entities of public law performing public tasks and acting

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24 See Case of the Federal Constitutional Court of Germany no. BVerfGE 61, 82 (101).

25 See e.g. Decision no. BVerfGE 61, 82 (105). Mainly: *„Die Gemeinde befindet sich auch bei Wahrnehmung nicht-hoheitlicher Tätigkeit in keiner »grundrechtstypischen Gefährdungslage …; sie wird auch in diesem Raum ihres Wirkens durch einen staatlichen Hoheitsakt nicht in gleicher Weise wie eine Privatperson „gefährdet" und ist mithin auch insoweit nicht „grundrechtsschutzbedürftig" … Verfehlt ist es schon, undifferenziert davon auszugehen, juristische Personen des öffentlichen Rechts seien bei ihrer Betätigung außerhalb dieses Bereiches in jedem Fall hoheitlichen Eingriffen ebenso unterworfen wie private Personen. Öffentliche Körperschaften genießen bei ihrer wirtschaftlichen Betätigung oder als Vermögensträger verschiedene „Vorrechte" (sog. Fiskusprivilegien), die Privaten nicht zustehen … . Weitere Besonderheiten ergeben sich etwa hinsichtlich der Polizeipflichtigkeit oder Steuerpflichtigkeit öffentlichrechtlicher Körperschaften … . Ins Gewicht fallen hier zudem außerrechtliche „Vorzüge", die mit der Stellung der juristischen Person des öffentlichen Rechts verbunden sind. Auch die mannigfachen Einflußmöglichkeiten über staatsinterne Wege schließen jedenfalls eine Vergleichbarkeit mit der „Abhängigkeit" des Bürgers, die materielle Grundrechtsverbürgungen besonders dringend macht, aus … ."*

26 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 105.

27 See Conclusion of the German Constitutional Court no. 2 BvR 659/07 of 29. 5. 2007, in relation to the constitutional complaint of Dresden municipality on plans for construction of a bridge over the Elbe.

28 See Baldeger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten*, 114.

as authority.[29] Territorial corporations of the state, counties and municipalities are especially entitled to them. The extensive explanation of the personal domain of validation of these guarantees are generally founded by their meaning visible to the legal state – the above mentioned ensures providing minimal requirements of procedural equity in the sense of fairness and equality of instruments as presumptions for the right decision because of which it has to be provided to all procedural participants (although it is an entity of public law).[30] The foundation that legal entities can be holders of human rights, which is otherwise as a rule founded on the purpose of exercising human rights as means of protection of dignity and personality of a person (German, *Durchgriffsthese*), moves into the background when it comes to procedural rights.[31]

### 3.2 Liechtenstein

From ancient times, municipalities have had a special status in the judicature of the Constitutional Court of Liechtenstein. As in the area covered by the Swiss constitution, which the Constitutional Court of Liechtenstein explicitly relies on,[32] as in e.g. Austria, in Liechtenstein municipalities may claim the autonomy guaranteed by the constitution.[33] Although para. 1, Article 110 of the Constitution of Liechtenstein implies that the law defines existence, organization and tasks of municipalities in personal and conveyed cases, this constitutional status is treated in terms of human rights – existence of municipalities in Liechtenstein is, according to the Constitutional Court »essential for the constitution« (German, *verfassungswesentlich*).[34] This requires explanation of the concept of »rights guaranteed by the constitution« (German, *verfassungsmässig gewährleistete Rechte*), which suits the need to protect municipalities.[35] That is why according to the Constitutional Court »it seems right to acknowledge to municipalities, in order to protect their autonomy, the legitimate right to file a constitutional complaint when they have been adversely affected in reference to constitutionally guaranteed rights to (local) self-government.“[36]

29 See Baldegger, *ibidem*.
30 See Baldegger, *ibidem*.
31 See Baldegger, *ibidem*.
32 See StGH 1984/14, Erw. 1, LES 1978, pp. 36 (38).
33 See W. Höfling, *Träger der Grundrechte*, in: Kley, Vallender (ed.): *Grundrechtspraxis in Lichtenstein*, 78.
34 See Höfling, *Träger der Grundrechte*, in: Kley, Vallender (ed.): *Grundrechtspraxis in Lichtenstein*, 79.
35 See *Ibidem*.
36 No. StGH 1984/14, Erw. 1, LES 1987, p. 36 (38). See statement of reasons for the decision of the Constitutional Court of Liechtenstein no. StGH 1998/27 of 23. 11. 1998, emphasizing that municipalities do not have to claim the rights from the EU Convention on human rights: „*Die vorliegende Beschwerde richtet sich gegen eine gem Art 23 StGHG letztinstanzliche E der VBI. Die Beschwerdefrist ist gewahrt. Die Bf macht einerseits eine Verletzung ihrer verfassungsmässigen Gemeindeautonomie, des Rechts auf Beschwerdeführung gem Art 43 LV sowie des rechtlichen Gehörs gem Art 31 und 43 LV und Art 6 Abs*

### 3.4 Switzerland

Entities of public law executing public authorizations, acccording to the practice of the Swiss Federal Court, are generally entitled to file a constitutional complaint on account of constitutional rights if » *they are not executing public authorizations, but are acting in the domain of private law, and are adversely affected by a contested decision in the same way as a private person* (German, »*wie ein Privater betroffen sind«*).«[37] The right to a human right is not abstract, but is about respecting specific circumstances and especially the actual constitutional guarantee. The Swiss Federal Court, in its verdict on the existance of analogous adverse effects as in cases involving private persons (individuals), rely primarily on the legal nature of the business contribution (German, *Handlungsbeitrag*) i.e. legal relationship (German, *Rechstverhältnis*), of the legal entity.[38] In this case, the legal form of the legal entity is irrelevant.[39]

According to the Swiss Federal Court, the same adverse effects, as in cases involving private persons, are present in case of entities of private law (e.g. municipalities, cantons) as well as other holders of (self) government, if they have been adversely affected as tax payers or payers of a particular contribution or as owners of a financial or administrative property which is not in general common use.[40]

In one of its decisions regarding the Swiss municipality of Arosa, the Court stated: »Municipalities have a legitimite right to file a constitutional complaint on account of violation of constitutional rights in general when in domain of private law or if otherwise... they act as legal subjects who are equal citizens adversely affected in the same way as a private person and by a contested state act … These assumptions have been filed in this case. In its constitutional complaint, the municipality of Arosa states that its financial property was adversely

*1 und Abs 3 EMRK geltend. ... Die Beschwerdelegitimation in bezug auf die Gemeindeautonomie ist ohne weiteres gegeben, da es genügt, wenn von der Gemeinde im Rahmen ihres hoheitlichen Handelns eine Autonomieverletzung geltend gemacht wird. Ob der Gemeinde im von der Beschwerde betroffenen Rechtsbereich tatsächlich Autonomie zukommt, ist indessen keine Frage der Legitimation, sondern Gegenstand der materiellen Prüfung der Beschwerde. ...“*

37 Also in cases of the Federal Court of Switzerland: BGE 112 Ia 356, p. 363; BGE 103 Ia 58, p. 59; BGE 111 Ia 146, p. 148; BGE Ia 113 Ia 336, p. 338; BGE 120 Ia 95, p. 97; BGE 125 I 173, p. 175. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 121.

38 See BGE 120 Ia 95, 97.

39 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten*, 121.

40 See decisions of the Federal Court of Switzerland in cases: BGE 96 I 466, p. 468; BGE 104 Ia 381, p. 387; BGE 112 Ia 356, p. 365; BGE 119 Ia 214, p. 216; BGE 121 I 218, p. 220 and BGE 123 III 454, p. 456. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten*, 121.

affected due to the breach of duty of the cantonal authority (also known as *Perimeterkommision*). The municipality requested this from the canton, relying on the law on responsibility (*Verantwortlichkeitsgesetz*). The municipality was in the same position as a private person, in the procedure against the state on account of the claimed adverse practice of the cantonal authority or a cantonal official… The municipality of Arosa was granted a legitimite right to file a constitutional complaint on account of malpractice… .«[41]

In case of a village corporation of public law (also known as a territorial community of public law – German, *Gebietskörperschaft*), which performs a public task by distributing electricity, the Swiss Federal Court negated the existance of analogous adverse effects as in a private person, resulting in exclusion of freedom of trade and commerce claims in this particular case.[42] The fact that the village corporation was denied granting a concession by the previous instance, i.e. by issuing a decree, presented in the Court's statement of reasons shows that »it has not been adversely affected in the same way as a private person, but as a holder of public authority.«[43]

### 3.5 The United States of America

The Supreme Court of the USA generally denies that municipalities and other entities of a lower rank within individual states can be holders of human rights.[44] The focus is on the standpoint denoting that organizational units of a lower

41 See BGE 107 Ia 175, p. 177. Mainly: „*Die Gemeinden sind zur staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte allgemein dann legitimiert, wenn sie sich auf dem Boden des Privatrechtes bewegen oder sonstwie ... als dem Bürger gleichgeordnete Rechtssubjekte auftreten und durch den angefochtenen staatlichen Akt wie eine Privatperson betroffen werden ... . Diese Voraussetzungen sind hier gegeben. Die Gemeinde Arosa macht geltend, sie sei durch Pflichtverletzung eines kantonalen Organs, der Perimeterkommission, in ihrem Finanzvermögen geschädigt worden; hierfür nimmt sie den Kanton gestüzt auf das Verantwortlichkeitsgesetz in Anspruch. Damit befindet sich in der nämlichen Lage wie ein Privater, der wegen behaupteten schädigenden Verhaltens seiner kantonalen Behörde oder kantonaler Beamter gegen den Staat prozessiert. ... Die Gemeinde Arisa ist daher zur Beschwerde wegen Willkür ... legitimiert*."

42 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 122

43 See BGE 72 I 17, p. 23. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,*, 122.

44 Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 172 cited main cases: Covington *v*. Kentucky, 173 U. S. 231 (1899), p. 242 (*contract clause*); City of Worcester *v*. Worcester Street Railway, 196 U. U. 539 (1905), p. 548 (*contract clause*); Hunter *v*. City of Pittsburgh, 207 U. S. 161 (1907), p. 179 (*contract clause/due process*); City of Trenton *v*. New Jersey, 262 U. S. 182 (1923), p. 118 (*contract clause/ due process*); City of Newark v. New Jersey, 262 U. S. 192 (1923), p. 196 (*equal protection/ due process*); Williams *v*. Mayor of Baltimore, 289 U. S. 36 (1933), p. 40 (*equal protection*); Coleman *v*. Miller, 307 U. S. 433 (1939, p. 441 (*contract clause/14th Amend.*), also: South Macomb Disposal Authority *v.* Township of Washington, 790 F.2d 500 (6th Cir. 1986), p. 504 (*equal protection/due process*).

rank within a state, founded by individual states with the purpose to contribute to better territorial administration, cannot exercise human rights against their »head unit«, i.e. an individual state as their founder. Subdivisions are segments of the state administration and states are allowed, within the scope of their competences, to decide freely about their organization and to disestablish its subdivisions and restrict or deprive them of their competences.[45]

Just like with other aspects of ability, being a holder of a human right in case of state authorities or authorities close to the state, is valid in relation to municipalities as well – the related case law is not consistent thus we come across multiple verdicts of lower courts deviating from this. Titularity to human rights of municipalities and other state authorities (subdivisions) related to the *due process clause* was acknowledged by lower courts if the complaint had not been filed against one's own state (one's own head unit).[46] Contradictory verdicts of lower federal courts insisted on titularity to human rights in reference to the First Amandment of the American Constitution.[47] Furthermore, the Supreme Court of the USA granted, without a justified statement of reasons, a complaint of a municipality sustaining a school on account of violating the principle of equality by the individual state.[48]

Additional insecurities were created by a previous decision of the Supreme Court of the USA from 1907.[49] In this decision, the Court denied municipalities

45 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 172.

46 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 172 and cases: Township of River Vale *v*. Town of Orangetown, 403, F.2d 684 (2d Cir. 1986), p. 686 (*due process*). Different in South Macomb Disposal Authority *v*. Township of Washington, 790 F.2d 500 (6th Cir. 1986), p. 504 (*due process/equal protection*).

47 Affirmatively, but without a further explantion, the Supreme Court decided in the case of County of Suffolk v. Long Island LightingCo., 710 F. Supp. 1387 (E. D. N. Y. 1989), p. 1390: „*A municipial corporation, like any corporation, is protected under the First Amendment in the same manner as an individual*." Sceptical and not thoroughly answered: Environmental Defense Center, Inc. *v*. United States Environmental Protection Agency, 344 F.3d 832 (9th Cir. 2003), p. 848; Creek v. Village of Westhaven, 80 F.3d. 186 (7th Cir. 1996), p. 192. Cited in M. Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 173. Case Washington *v.* Seattle School Disctrict No. 1, 458 U. S. 457 (1982). In one of the previous decisions, the American Supreme Court opened the issue of communal school authority as a holder of a human right, but has not come to a decision: – Madison School District *v*. Wisconsin Employment Relations Com., 429 U. S. 167 (1976). Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 173.

48 See Case Washington v. Seattle School Disctrict No. 1, 458 U. S. 457 (1982). In one of the previous decisions, the American Supreme Court opened the issue of communal school authority as a holder of a human right, but has not come to a decision: – Madison School District *v*. Wisconsin Employment Relations Com., 429 U. S. 167 (1976). Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 173.

49 See Case Hunter v. City of Pittsburgh, 207 U. S. 161 (1907), p. 178. The Supreme Court of the USA decided, likewise, in the case of Worcester *v*. Worcester Consolidated Street Railway, 196 U. S. 539 (1905),

the possibility to claim their right to the *due process clause* (14th Amandment of the American Constitution) when depriving them of the property intended for execution of administrative tasks, against an individual state, and at the same time, it stated that in case of the property which the municipality as a »private person« owns for »private purposes«, that fact would lead to a different resolution.[50] In later decisions, the Court never clarified this issue.[51]

Municipalities can, according to the current case law of the Supreme Court of the USA claim certain aspects of the right to property – i.e. *takings clause* of the Fifth Amendment against federal authorities.[52]

The legal position related to titularity of municipalities and other state subdivisions is very confusing and unreliable.[53]

## 4. CASE LAW OF THE CONSTITUTIONAL COURT OF SLOVENIA

The question whether the state or other legal entities of public law, as well as municipalities and other self-governing local communities can be holders of human rights, in Slovenia just like in comparative law, is related to the case law of the Constitutional Court when legitimacy for filing a constitutional complaint is concerned. [54]

Apparently, the Constitutional Court of Slovenia has not completed the practice of providing an active legitimation of the state and state authorities and other entities of public law. In the case no. OdlUS XIII, 90, Up-387/03, Official

p. 551. Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 173.

50 Cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten*, 173 in the modern theory *M. A. Lawrence* advocated the idea to recognize to municipalities the etitlement to human rights in reference to *due process clause*, if an individual state interferes with the property of a municipality as a »private person« i.e.«for private purposes«.

51 The possibility to protect municipalities and other state subdivisions within the scope of human rights in the sense of »private« property, has been signalized differently in the practice of the Supreme Court and some lower courts. The Supreme Court of the USA has never specifically acknowledged titularity of human rights to state subdivisions. In case of municipalities, distinction between their position when performing public functions v. private functions, was abandoned – *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), p. 505; cited in Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 173.

52 See Case United States v. 50 Acres of Land, 469 U. S. 24 (1984), p. 31. Titularity of human rights can be applied to property intended for execution of administrative tasks. The decision does not answer the question whether a municipality in case of being deprived of the property (*takings clause)* can exercise rights against its country. Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 174.

53 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 174.

54 Review according to Sebastian Nerad, in: Lovro Sturm (ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* (Ljubljana: Graduate School of Government and European Studies, 2011), 1452.

Gazette RS, no. 131/04, the Constitutional Court insisted on the standpoint that legal entities of public law, specifically a public institute and municipality, are holders of *constitutional procedural guarantees* and thus are entitled to filing a constitutional complaint. As far as the state is concerned, the Slovenian Constitutional Court adopted the standpoint that, in the first place, the function in which the state is acting should be determined – as a holder of authority or as the one who is not a holder of authority; in court procedures not arising from the acts of state (*iure imperii*), but from private acts (*iure gestionis*), the state is equated with other entities of private law and accordingly has been provided procedural guarantees of constitutional nature from Article 22.

The emphasis should be placed on the standpoint of the Constitutional Court that since the legislator entitles entities of public law to protection of their legal status in court procedures, the public institute is entitled to the same right (Decision no. Up-199/98 of 25. 3. 1999). The statement of reasons of this Conclusion is based on the standpoint that the court procedure is a mechanism which would not function properly if the rules were not applied in the same way to both parties involved in the court procedure. Exclusion of an entity of public law would undermine the required balance and would lead to the violation of one of the basic constitutional principles, i.e. principles of the rule of law. The Constitutional Court confirmed this standpoint in the case no. Up-373/97[55] during meritory proceedings of allegations made by a municipality that, during civil proceeding, its rights to remedies from Article 25 of the Constitution and the same protection of the rights from Article 22 of the Constitution were violated, and the Constitutional Court was not definite in reference to the question whether a municipality as an entity of a public law can claim protection of rights to private property from Article 33 of the Constitution. A partial answer to the question to which extent entities of public law can be holders of the constitutional right to private property, can be found in the statement of reasons of the Constitutional Court in the procedure of an abstract verdict (OdlUS IV, 19, U-I-179/94, Official Gazette RS, no. 28/95; OdlUS VI, 11, U-I-304/95, Official Gazette RS, no. 11/97; OdlUS VI, 52, U-I-82/96, Official Gazette RS, no. 35/97; OdlUS VI, 57, U-I-112/95, Official Gazette RS, no. 34/97).[56]

55 See OdlUS X, 108 and Official Gazette RS, no. 19/2001.

56 See Franc Testen, in: Lovro Šturm (ed.), *Komentar Ustave Republike Slovenije* (Ljubljana: Faculty for Postgraduate Government and European Studies, 2002), 1101.

## 5. CONCLUSION

The conclusion based on the comparative review is that some European Constitutional Courts, as well as the Supreme Court of the USA, rely on the standpoint (however, less consistent in practice) that municipalities are, in certain situations, titulars of human rights.

In Switzerland and the USA, there is a prominent tendency to secure the federal structure of the state as a »human right«. The Supreme Court of the USA follows, in relation to protection of human rights of legal entities, a rather liberal idea, which would not be affirmed in case the Supreme Court confirmed titularity of human rights to municipalities and individual states as undisputable state actors. However, federally inclined considerations are prevailing in the USA, because the liberal idea, which is focused on separating private from the state sphere, is negating titularity of human rights to actors which can be attributed to the state (to central administration, in the first place).

The German Federal Constitutional Court e.g. emphasizes that municipalities, even when not performing public authorizations, do not act in terms of exercising private freedom, but in order to secure state competences. The Court, generally, denies that the (vertically decentralized) state should be adversely affected in the same way as an individual (subject of a private law) by state measures (of other state actors).[57]

The conclusion is that, to a certain extent, development of the concept of titularity was inevitable, for municipalities and other self-governing local communities as entities of public law (in some cases their importance has been recognized in the process of exercising rights of the members of local communities, or it is about establishing procedural equality at the constitutional level which is in a broad sense a postulate of the rule of law), and, in many cases, it was politically conditioned by achieving legal and political goals in federal states.

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57 See Baldegger, *Menschenrechtsschutz für juristische Personen in Deutschland, der Schweiz und den Vereinigten Staaten,* 178.

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# ЈЕДИНИЦЕ ЛОКАЛНЕ САМОУПРАВЕ КАО МОГУЋИ НОСИОЦИ ЉУДСКИХ ПРАВА


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***Резиме:*** *Аутор у овом чланку уз помоћ научне методе компарације и анализе, приказује судску праксу у вези са положајем општина и других јединица локалне самоуправе које су јавноправна лица као могући носиоци људских права. Ове јединице локалне самоуправе по правилу дијеле начелни положај јавноправних лица, којима правни поредак признаје (само) статус адресата људских права, али не и носилаца. Из уставносудске јудикатуре неких европских држава (Њемачка, Лихтенштајн, Швајцарска), посебно и Словеније, и Сједињених Америчких Држава, као представнице англосаксонског система, произилази да се локалним заједницама признаје или остваривање тзв. процесних људских права (јер се овдје не захтијева веза са остваривањем достојанства појединца) и права својине или право на подношење тзв. комуналне уставне жалбе када се ради о остваривању заштите локалне самоуправе против неуставног посега у уставно право локалне самоуправе. Аутор сматра да је развој титуларства општина у вези са људским правима, тј. општина као носилац људских права, често правнополитички условљен.*



***Кључне речи:*** *Локална самоуправа, општине, људска права, носилац људских права, јавноправна лица*



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